MAR 4 1975

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-786

LLOYD A. FRY ROOFING COMPANY,
A CORPORATION,
Petitioner,

vs.

ILLINOIS POLLUTION CONTROL BOARD, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, THE COUNTY OF COOK, A BODY POLITIC, VILLAGE OF SUMMIT, REV. LOUIS HEMMERICH, ET AL.,
Respondents

REPLY BRIEF IN OPPOSITION TO BRIEF OF ATTORNEY GENERAL OF ILLINOIS AND IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

BURTON Y. WEITZENFELD,
ARTHUR L. KLEIN,
PAUL L. LEEDS,
75th Floor - Sears Tower,
233 South Wacker Drive,
Chicago, Illinois 60606
Counsel for Petitioner.

ARNSTEIN, GLUCK, WEITZENFELD & MINOW,
Of Counsel.

Gunthorp-Warren Printing Company, Chicago • 346-1717

TABLE OF CITATIONS.

CASES.	PAGE
Cameron v. Johnson, 390 U. S. 611 (1968)	4
Cline v. Frink Dairy Company, 274 U. S. 445 (1927)	4
Davern v. Civil Service Commission, 47 Ill. 2d 469 (1970)	3
Morgan v. United States, 304 U. S. 1 (1938)	7
Mystik Tape v. Pollution Control Board, 16 Ill. App. 3d 778 (1973)	3
NLRB v. Babcock and Wilcox Co., 351 U. S. 105 (1955)	3
Pacesetter Homes v. Village of South Holland, 18 Ill. 2d 247 (1959)	3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-786

LLOYD A. FRY ROOFING COMPANY,
A CORPORATION,
Petitioner,

vs.

ILLINOIS POLLUTION CONTROL BOARD, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, THE COUNTY OF COOK, A BODY POLITIC, VILLAGE OF SUMMIT, REV. LOUIS HEMMERICH, ET AL.,
Respondents

REPLY BRIEF IN OPPOSITION TO BRIEF OF ATTORNEY GENERAL OF ILLINOIS AND IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

ARGUMENT.

I.

THE DECISION BELOW CONFLICTS WITH AND INDEED FLAUNTS THE HOLDINGS OF THIS COURT IN CASES SUCH AS UNITED STATES v. L. COHEN GROCERY, 255 U. S. 81 (1920), CONNALLY v. GENERAL CONSTRUCTION COMPANY, 269 U. S. 385 (1926), CLINE v. FRINK DAIRY COMPANY, 274 U. S. 445 (1927), GIACCIO v. PENNSYLVANIA, 382 U. S. 399 (1966) AND PAPACHRISTOU v. CITY OF JACKSONVILLE, 405 U. S. 156 (1972) THAT STATUTES AS VAGUE, INDEFINITE AND UNCERTAIN AS THE ILLINOIS ENVIRONMENTAL CONTROL ACT VIOLATE DUE PROCESS. IF THE DECISION BELOW IS PERMITTED TO STAND, THERE WILL BE NO GUIDELINES WHATSOEVER UPON WHICH PERSONS MAY BASE THEIR CONDUCT SO AS TO PREVENT A CONVICTION FOR "AIR POLLUTION" UNDER THE ILLINOIS ACT AND SIMILAR STATUTES.

The touchstone of Illinois Attorney General's argument is founded upon Section 33(c) of the Act*, a provision which purports to list certain factors for the Pollution Control Board to "consider" in determining the "reasonableness" of emissions. But Petitioner submits that the lack of merit in this argument is readily apparent.

In the first place, the so-called "limitations" or "definitions" contained in Section 33(c) are every bit as meaningless and obscure as the more general prohibition against "unreasonable interference." Clearly, they do not cure the unconstitutional vagueness inherent in this Act.

Moreover, the State has neglected to advise this Court that the Illinois Pollution Control Board did not even consider Section 33(c) in deciding this case. As the Appellate Court stated:

* Ill. Rev. Stats., ch. 111½, § 1033(c).

> "We note that, in its order, the Board failed to demonstrate compliance with this section [§ 33(c)] in that the order did not indicate consideration of the factors enumerated therein." (Appendix A to Petition, P. A15.)

While the Appellate Court apparently viewed the record as containing some evidence which the Board might have considered in conjunction with Section 33(c) had the Board complied with the Act, it is well settled that a reviewing court may not substitute its judgment for that of an administrator and cannot permit an administrative decision to stand if it rests upon erroneous legal foundations (*NLRB* v. *Babcock and Wilcox, Co.*, 351 U. S. 105 (1955); *Davern* v. *Civil Service Commission*, 47 Ill. 2d 469 (1970); *Mystik Tape* v. *Pollution Control Board*, 16 Ill. App. 3d 778 (1973)). Clearly, Section 33(c) has no bearing upon the propositions advanced in the Petition for Certiorari.

The State further contends that Petitioner may not mention to this Court that the Illinois Statute contains language, in addition to "unreasonably interfer[ing] with the enjoyment of life or property", which is also unconstitutionally vague. But this contention too is without merit, particularly so since the State does not claim that the additional language is proper.

Obviously, the main thrust of Petitioner's argument is directed to the "unreasonable interference" provision. Yet in view of the conflicting nature of the holdings below, Petitioner respectfully submits that it is wholly justified in pointing out the invalidity of the entire Statute to this Court. It cannot be said with any degree of certainty that these other prohibitions were not involved in the decisions below. And, as the Illinois Supreme Court has held:

> "The validity of a penal ordinance such as the one in question here cannot be made to depend upon facts found in the particular case . . . It is either valid as to all that it embraces or it is invalid as to all that it embraces." (*Pacesetter Homes* v. *Village of South Holland*, 18 Ill. 2d 247, at pp. 250-251 (1959)).

Finally, the State's reliance upon the majority opinion in *Cameron* v. *Johnson*, 390 U. S. 611 (1968) is totally misplaced. In the first place, the statute involved in *Cameron* was directed to the physical acts of picketing and demonstrating. It did not purport to prohibit "contamination", a word so broadly defined in the Illinois Act as to literally forbid breathing. Moreover, as this Court specifically noted in *Cameron*, the words "unreasonably interfere" were used there in direct juxtaposition with "obstruct" and "free ingress or egress to and from any public premises." The *Cameron* statute obviously contained guidelines sufficient to enable persons "of common intelligence" to determine "what conduct on their part will render them liable to its penalties" (*Cline* v. *Frink Dairy Company*, 274 U. S. 445 (1927), at p. 459). No guidelines, except the unfettered whim of a State court or administrative board, appear in the Illinois Act and *Cameron* is completely inapplicable here.

II.

UNDER THE ILLINOIS ENVIRONMENTAL PROTECTION ACT, A CHARGE OF VIOLATION MAY BE BROUGHT IN CRIMINAL COURT OR IN A SO-CALLED "ADMINISTRATIVE" PROCEEDING. BUT AN ADMINISTRATIVE DEFENDANT IS SUBJECT TO A GREATER MONETARY PENALTY THAN A CRIMINAL DEFENDANT CHARGED WITH THE SAME OFFENSE. YET AN ADMINISTRATIVE DEFENDANT IS DENIED THE RIGHT TO A TRIAL BY JURY, DENIED THE RIGHT TO A TRIAL UNDER THE RULES OF EVIDENCE AND DENIED THE RIGHT TO PROOF OF GUILT BEYOND A REASONABLE DOUBT. SINCE THE STATE MAY ARBITRARILY PICK AND CHOOSE BETWEEN THESE TWO MEANS OF ENFORCEMENT, THE ACT VIOLATES EQUAL PROTECTION AND DUE PROCESS.

Petitioner submits that the State's position with respect to this section of the Petition for Certiorari is simply a blatant appeal for the elevation of form over substance. While the Illinois

Supreme Court has said that proceedings before the Pollution Control Board are "civil" in nature, those decisions were rendered in response to arguments that the Board had invaded the *judicial* power by computing and imposing fines.

The point of Petitioner's contention here, completely ignored by the State, is that it does not matter whether a Board proceeding be called "civil", "quasi-criminal", "administrative", or by any other name. The label is irrelevant. What is significant is that the *substance and effect* of such a proceeding so closely resemble the criminal proceeding provided as an alternative means of enforcement under the Act that the State simply cannot be permitted to choose the "administrative" proceeding unless an administrative defendant receives the same guarantees as a criminal defendant. But an "administrative" defendant under the Illinois Act is clearly denied those rights. If that Act is permitted to stand, any charge at all may now be heard by a nonjudicial "administrative" tribunal and trials before such bodies may proceed without any of the well-settled rules long held necessary to protect the rights of a defendant. Indeed, that is precisely what occurred in this case.

Petitioner respectfully submits that the State's attempt to suggest that labels are more important than substance should not be permitted to obscure the clear constitutional defects contained in the Illinois Environmental Protection Act.

III.

THE ILLINOIS ENVIRONMENTAL PROTECTION ACT AND THE POLLUTION CONTROL BOARD'S PROCEDURAL RULES GUARANTEE THAT A DEFENDANT HAS THE RIGHT TO SUBMIT WRITTEN AND ORAL ARGUMENT. BUT THE BOARD HERE REFUSED TO PERMIT FRY TO SUBMIT WRITTEN OR ORAL ARGUMENT AND THE APPELLATE COURT'S DECISION UPHOLDING THE BOARD IS IN CLEAR CONFLICT WITH THE STATUTE, THE BOARD RULES, THE CONSTITUTION AND THE LAW OF THIS COURT.

Review of the State's brief clearly reveals that it has not and indeed cannot rebut the propositions that Fry was wrongfully denied its due process right to submit argument and that this denial was in obvious violation of the Statute, the Board's own Rules and the law of this Court. However, brief comment does appear required as to some of the State's patently improper assertions.

Thus, the State posits that "Fry has not contended" the Board violated the Act when it decided the case before Fry had the opportunity to submit a brief or to make oral argument. But surely such an incredible assertion could only be meant to mislead this Court. Fry has clearly made such a contention, not only in its Petition for Certiorari, but also before the Board, the Illinois Appellate Court and the Illinois Supreme Court. What Fry has argued is that the Statute and Board Rules grant a defendant the absolute right to submit a written brief *after* the close of the hearing and further require that the Board consider both the brief and oral argument before it decides the case. The Board below flagrantly and wilfully defied the Statute and its own Rules. Such conduct may not be excused by the bald misstatement that Fry made no such contention or by the equally improper device of arguing that the Statute and Board Rules should be construed in a manner completely contrary to their

clear language. The Statute provides that "any party to a [Board] hearing . . . may make oral or written argument" (Section 1032). The Board Rules state that: "The parties may submit written briefs to the Board . . . *after the close of the hearing* . . .". (Rule 330, emphasis supplied). Those rights were denied to Fry.

And even if the Statute and Rules were not so clear, the law of this Court, as reflected in the "second *Morgan*" case (*Morgan* v. *United States*, 304 U. S. 1 (1938)), unquestionably provides the same guaranteed right to submit argument to the decision maker before one is convicted of statutory violation and fined a most substantial sum. It is the State, Petitioner submits, which has misread that case. As Fry pointed out in its Petition for Certiorari, any "argument" which might be made during the course of a trial or hearing is neither sufficient to meet the clear language of the Statute and Rules nor due process as defined by this Court. Indeed, it is completely irrelevant to the point at hand, despite the State's efforts to create confusion in that regard. The Board and the Illinois Courts have clearly ignored the Statute and Rules and have denied Fry due process. The decision below should be aside.

CONCLUSION.

Petitioner respectfully prays that its Petition for Writ of Certiorari be granted.

Respectfully submitted,

BURTON Y. WEITZENFELD,
ARTHUR L. KLEIN,
PAUL L. LEEDS,
75th Floor - Sears Tower,
233 South Wacker Drive,
Chicago, Illinois 60606
Counsel for Petitioner.

ARNSTEIN, GLUCK, WEITZENFELD
& MINOW,
Of Counsel.